BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DENNIS D. CARVER Claimant V. **DELTA INNOVATIVE SERVICES** Respondent AND **AIG DOMESTIC CLAIMS, INC., and MIDWEST BUILDERS CASUALTY MUTUAL COMPANY** Insurance Carriers AND **KANSAS WORKERS COMPENSATION FUND**	)	Docket No. 1,042,520

ORDER

Respondent and its insurance carrier AIG Domestic Claims, Inc., (AIG) appealed the March 3, 2015, Award entered by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on July 14, 2015, in Lenexa, Kansas.

APPEARANCES

Mark E. Kelly of Liberty, Missouri, appeared for claimant. John David Jurcyk of Kansas City, Kansas, appeared for respondent and AIG. C. Anderson Russell of Lee's Summit, Missouri, appeared for respondent and Midwest Builders Casualty Mutual Company (Midwest). Timothy G. Elliott of Overland Park, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. However, the parties agreed Exhibits 13 and 16 to Volume VII of the Transcript of Final Proceedings before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri are not part of the record. The record also includes the transcript of the May 20, 2014, regular hearing and exhibits thereto and the transcript of

the September 10, 2013, deposition of claimant and exhibit thereto. At oral argument, the parties agreed the findings of fact made by the Missouri Labor and Industrial Relations Commission (Commission) and the Missouri Court of Appeals are res judicata in this claim, but not their legal conclusions. The parties also agreed claimant is permanently totally disabled.

ISSUES

The ALJ ruled that claimant sustained a back injury by accident arising out of and in the course of his employment with respondent on October 1, 2007, provided timely notice and timely written claim, and should not be denied compensation because he violated respondent's safety rules.

Respondent and AIG request the Board reverse ALJ Howard's Award and find claimant failed to provide timely notice and timely written claim and willfully violated a safety rule. If this claim is compensable, respondent and AIG assert claimant sustained subsequent accidents on October 5, 2007, February 20, 2008, April 8, 2008, and/or May 6, 2008, that aggravated his preexisting condition and, therefore, Midwest is responsible for claimant's medical expenses commencing October 5, 2007. At oral argument, respondent and AIG indicated they were no longer alleging claimant sustained a subsequent accidental injury on October 12, 2007.

Claimant requests the Board affirm the Award. Claimant maintains he gave timely notice, provided timely written claim and respondent failed to enforce the safety rule he allegedly violated. Finally, claimant argues there is no evidence any alleged subsequent events aggravated, accelerated or exacerbated claimant's medical condition.

Respondent and Midwest request the Board uphold ALJ Howard's Award on all issues.

The Fund requests the Board affirm ALJ Howard's Award.

The issues are:

1. Did claimant provide timely notice of his accidental injury?

2. Did claimant provide timely written claim?

3. Did claimant willfully violate safety rules that resulted in his accidental injury?

4. Was there an event or events after October 1, 2007, that necessitated medical treatment for claimant's low back condition and/or permanently aggravated, exacerbated or accelerated his low back and left leg conditions?[1]

FINDINGS OF FACT

Claimant filed claims in both Missouri and Kansas, alleging that on October 1, 2007, he injured his back while carrying a roll of felt up a ladder at the Federal Reserve project in Kansas City, Missouri. The date of claimant's injury is determinative of which insurance carrier, AIG or Midwest, had coverage. As explained by the parties at oral argument, AIG provided workers compensation coverage for respondent on a Federal Reserve project only and that coverage ended on October 1, 2007. Midwest provided workers compensation coverage for respondent on all other jobs, including those jobs where claimant worked after October 1, 2007.

In 2010, a Missouri administrative law judge issued a final award finding claimant sustained a work accident arising out of and in the course of his employment on October 1, 2007, and was permanently totally disabled. The Missouri judge concluded the prevailing factor for claimant's back injury was his October 1, 2007, accident. Claimant was awarded temporary total disability benefits of $64,720.62 for 87.14 weeks and permanent total disability benefits at the rate of $742.72 per week. However, the judge reduced claimant's award by 50% under Missouri law because claimant knowingly violated respondent's safety rule of not following the "three-point contact rule,"[2] which precludes employees from carrying anything up a ladder.

Claimant appealed the ALJ's ruling on the safety rule violation to the Commission, and to the Missouri Court of Appeals, which remanded the matter to the Commission for more specific findings on the safety rule violation. Ultimately the Commission found respondent took no steps to enforce the "three-point contact rule" and set aside the 50% reduction in claimant's benefits.

On October 14, 2008, claimant filed an application for hearing in Kansas. At oral argument, claimant indicated he filed a Kansas claim because the Kansas statute concerning post-award medical treatment is less cumbersome and complicated than Missouri's and provides for a speedier path for an injured worker to obtain post-award medical benefits.

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[1] At oral argument, the parties agreed these were the only issues on appeal.

[2] The record indicates the "three-point contact" safety rule requires that any worker climbing a ladder must have three body parts in contact with the ladder at all times.

In the March 3, 2015, Award, ALJ Howard found claimant sustained an accidental injury arising out of and in the course of his employment with respondent on October 1, 2007, which was during AIG's period of coverage. ALJ Howard found claimant provided timely written claim and did not breach a safety requirement which would prevent recovery of compensation. ALJ Howard ruled claimant provided timely notice, stating:

> Notice pursuant to claimant's testimony was provided to Dan Boyle, pursuant to KSA 44-520. Mr. Boyle wasn't able to deny that claimant gave him notice on several occasions prior to medical treatment that the respondent authorized. In the absence of any evidence directly contradicting the evidence of claimant, it appears that notice was given . . . within seven days of the October 1, 2007 occupational event.[3]

ALJ Howard noted that in claimant's Missouri claim claimant, as of February 1, 2015, was paid $284,461.76. The ALJ ordered an award of permanent total disability, but because the maximum of $125,000 allowed under the Kansas Workers Compensation Act had been paid in Missouri, no additional payments were awarded and the ALJ found that pursuant to K.S.A. 44-525(b), respondent was entitled to a credit for any sums previously paid. The ALJ ordered the entirety of the award be borne by respondent and AIG because AIG provided workers compensation coverage for respondent at the time of claimant's October 1, 2007, accident.

Claimant was a commercial roofer for 29 years, and as of October 1, 2007, had worked for respondent approximately three years. Claimant was working on a large roofing project at the Federal Reserve and October 1 was going to be the last day of the job. Claimant and Jeremy Reno were the only crew members still working on the job. They worked separately and claimant was Mr. Reno's foreman. On October 1, 2007, early in the day, claimant was carrying a 100-pound roll of modified[4] up a ladder to the roof of the parking garage elevator when he felt pain in his back radiating into his left buttock and leg. He testified he carried the roll of modified and did not use a lift because height restrictions would not allow the use of a crane to lift the rolls and the hoisting equipment was no longer at the job site.

Claimant testified he had pain the remainder of the day, but continued working. He did not notify respondent of his injury on October 1 because it was not uncommon to have a pulled muscle, cut finger or a bruise. He did not work the next day because it rained, but returned to work on Wednesday, October 3. October 3 was payday and that morning, claimant reported his back was hurting to his supervisor, Danny S. Boyle, Jr. Claimant testified he reported to Mr. Boyle of having a back strain and that he wished somebody

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[3] ALJ Award (Mar. 3, 2015) at 10.

[4] Claimant testified modified is a composite top sheet with granules on it for aesthetic value and also has a weather barrier. The terms "modified" and "felt" are synonymous and were used by witnesses.

could take his place and he could be off work. That day, claimant worked at Oak Park Mall as a safety monitor and was able to take it easy. He also testified that he was cutting pieces of flashing and ran a torch for a while and that his pain was getting worse.

Claimant was off work on October 4 because of rain, but worked on October 5. On October 5, he worked at Oak Park Mall and took it easy cutting flashing for skylights. Claimant was supposed to work on Saturday, October 6, but called Mr. Boyle and told him he was hurting and was not up to working. Claimant admitted he was instructed to report a work injury to the Federal Reserve site safety office, but did not.

On Monday, October 8, 2007, claimant saw his family physician, Dr. Mitzi Gore, who gave claimant medications and told him to remain off work three days and rest. Claimant told Mr. Boyle he was going to be off work three days and reported "that my back was hurting and I had gotten some medication and the doctor wanted me to rest for at least three days to be off. So he understood. He's a good employer."[5] Claimant returned to work on Thursday, October 11, but his pain worsened.

Claimant called Dr. Gore's office on October 15 and an MRI was scheduled for October 16. Claimant was referred to Dr. Andrew B. Kaufman and saw him on October 17, but was dissatisfied with his services and saw Dr. Robert M. Drisko, II, on October 18, 2007. According to claimant, Dr. Drisko reviewed the MRI and diagnosed claimant with a herniated disc. The same day he saw Dr. Drisko, October 18, claimant spoke to Mr. Boyle and requested medical treatment and was sent to Concentra, where he was seen on October 19.

Mr. Boyle, claimant's supervisor, testified his family owns respondent and employs 60 to 70 roofers. He testified that most days, he speaks to every roofer. Mr. Boyle indicated J. E. Dunn Construction Company was the general contractor on the Federal Reserve project. Mr. Boyle testified claimant was dependable and truthful and was a part-time foreman for respondent. Mr. Boyle indicated that at the end of the Federal Reserve project, a "punch list"[6] was completed by claimant and a helper.

Mr. Boyle did not remember the first time he was told by claimant that he had back pain or when claimant reported he could not work due to back pain. Mr. Boyle confirmed claimant's time sheet showed he worked at the Federal Reserve project on October 1, 2007, was off work October 2, 4 and 7 and worked at the Oak Park Mall on October 3 and 5. He did not have any recollection of speaking to claimant on October 6, 2007, but

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[5] Transcript of Final Proceedings before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Vol. I at 72.

[6] Mr. Boyle explained a punch list is where items identified by the architect, owner or engineer are fixed.

it was possible claimant called and indicated he did not feel like coming to work. Mr. Boyle indicated claimant did not work October 8-10, 2007, but did not know why.

Mr. Boyle indicated that at some point an accident report was completed because claimant reported being hurt and wanted to see a doctor. However, Mr. Boyle was not asked when the accident report was completed. Mr. Boyle testified:

> Q. If Dennis testified that he told you on that Wednesday morning, October 3, that he was having some tightness in his back, some back pain and you encouraged him to go to work because you needed to get the job done, do you know whether that's accurate?
>
> A. I would say no.
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> Q. You would say, no, it's not?
>
> A. No.
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> Q. Why do you say that?
>
> A. If a man is hurt, we'll send them to the doctor.[7]

According to Mr. Boyle, he never conversed with claimant about where claimant was working when he hurt his back, but had no reason to believe claimant was lying when he testified he hurt his back when carrying something heavy up a ladder.

Mr. Boyle indicated claimant went to Concentra on October 19 and was required to take a drug test. He testified a drug test is only ordered when a worker requests to see a doctor. If a worker does not request to see a doctor, Mr. Boyle assumes the worker has an ache and is not hurt. If a worker tells Mr. Boyle the worker has back pain, Mr. Boyle does not consider it an accident unless the worker sees a doctor.

Mr. Reno, an apprentice roofer in October 2007, testified he and claimant worked on the Federal Reserve project completing a punch list that took three days. Mr. Reno did not recall claimant complaining of back pain on October 1, 2007, but did recall riding claimant for not pulling his weight. Sometime after the accident, claimant contacted Mr. Reno and asked Mr. Reno if he remembered riding claimant on October 1, 2007. When Mr. Reno answered yes, claimant stated that was because of his back problem.

Joseph F. Jakofcich, the J. E. Dunn Construction Company superintendent for the Federal Reserve project, testified concerning the safety rules for the project. He testified

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[7] Transcript of Final Proceedings before the Division of Workers' Compensation Department of Labor and Industrial Relations of Missouri Vol. VI, Employer and Insurer's Ex. 7 (Boyle Depo. at 43).

that all tradesmen working on the project received training to report accidents to the site safety office.

Because of the Board's findings and conclusions on the issue of notice, the Board has not set forth facts pertaining to the issues of timely written claim, claimant's alleged violation of respondent's safety rules and whether claimant aggravated his back injury as the result of subsequent events.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[8] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."[9]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.[10]

In *Thomas*,[11] Thomas, a resident of the District of Columbia, received an award of disability benefits from the Virginia Industrial Commission under the Virginia Workmen's Compensation Act for injuries received in Virginia while employed by respondent, which was principally located in the District of Columbia where Thomas was hired. Subsequently, Thomas received a supplemental award under the District of Columbia Workmen's Compensation Act over respondent's contention that since, as a matter of Virginia law, the Virginia award excluded any other recovery "at common law or otherwise," the District of Columbia's obligation to give that award full faith and credit precluded a second, supplemental award in the District. The Supreme Court held that the full faith and credit clause does not preclude successive workers compensation awards, since a state has no legitimate interest within the context of the federal system in preventing another state from granting a supplemental compensation award when that second state would have had the power to apply its workers compensation law in the first instance.

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[8] K.S.A. 2007 Supp. 44-501(a).

[9] K.S.A. 2007 Supp. 44-508(g).

[10] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

[11] *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980).

Respondent and AIG allege claimant failed to provide timely notice because he did not notify respondent of the time, place or particulars of his accident. Claimant asserts he gave timely notice when he reported his back was hurting to his supervisor, Mr. Boyle, the morning of October 3, 2007.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Notice is intended to afford an employer an opportunity to investigate an accident and to furnish prompt medical treatment.[12] Whether a claimant provided timely notice of an accident to an employer under K.S.A. 44-520 is a question of fact to be determined by the Board.[13] The Board's determination of a fact issue is binding on the appellate courts if supported by substantial evidence in the record.[14]

The Board and appellate courts have decided on numerous occasions that a claimant failed to provide timely notice because he or she failed to provide the specific information required by K.S.A. 44-520:

- In *Poff*,[15] claimant requesting a hearing examination the day before his last day working for IBP to determine if he had hearing loss was not timely notice of an accident.

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[12] See *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

[13] See *Myers v. Lincoln Center Ob/Gyn*, 39 Kan. App. 2d 372, 375, 180 P.3d 584, *rev. denied* 286 Kan. 1179 (2008).

[14] *Id.*

[15] *Poff v. IBP, Inc.*, 33 Kan. App. 2d 700, 106 P.3d 1152 (2005).

- In *Camp*,[16] the Kansas Court of Appeals stated, "Camp's casual conversations with his supervisor about back pain are not substantial evidence to support proof of notice as required under K.S.A. 44-520."

- The Board, in *Beatty*,[17] found Beatty failed to give timely notice when he testified he discussed his leg problems with his supervisor on several occasions, but did not actually state the working conditions were causing his problems.

- In *Serra*,[18] a Board Member denied Serra's claim because Serra admitted to providing respondent no information regarding the work-related nature of his many ongoing, physical microtrauma-type problems.

- In *White*,[19] a Board Member found White's general comment to his supervisor that he was sore and unable to work did not constitute notice of his accident.

Applying K.S.A. 44-520 and the foregoing case law to the facts of this claim, the Board finds claimant failed to provide timely notice. He did not provide information concerning the particulars of his accidental injury such as where, when and how the accident occurred. He did not tell respondent he had a work accident until October 18, 2007.

Claimant testified extensively in this matter. He testified he communicated that he had back pain to his supervisor three times within the statutory 10-day notice period. Claimant had at least three opportunities to inform his supervisor of his accident, but did not do so. Even if it can be construed that claimant timely reported his October 1, 2007, work accident, he failed to inform respondent how, when and where his accidental injury occurred.

On October 3, 2007, claimant told Mr. Boyle of having back pain, but did not testify he told Mr. Boyle how, when and where he injured his back. On October 6, claimant contacted Mr. Boyle and asked off work because of back pain, but again did not testify he provided information concerning how, when and where he sustained an accidental work

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[16] *Camp v. Bourbon County*, No. 104,784, 2012 WL 3135512 (Kansas Court of Appeals unpublished opinion filed July 27, 2012), *rev. denied* Sept. 4, 2013.

[17] *Beatty v. Gracon Corporation*, No. 261,770, 2003 WL 21396821 (Kan. WCAB May 29, 2003).

[18] *Serra v. Kansas City Kansas Housing Authority*, Nos. 1,027,810, 1,027,811 & 1,027,812, 2006 WL 3328580 (Kan. WCAB Sept. 27, 2006).

[19] *White v. Love Box Company, Inc.*, No. 262,008, 2001 WL 507218 (Kan. WCAB Apr. 27, 2001).

injury. Claimant was taken off work on October 8, 2007, for three days because of his back condition by Dr. Gore. Claimant indicates he informed Mr. Boyle, but did not testify he provided information concerning the particulars of his accidental injury. Moreover, Mr. Boyle indicated he never conversed with claimant about where claimant was working when he hurt his back.

In light of the Board's ruling that claimant failed to provide timely notice of his accident, all other issues raised by the parties are moot.

CONCLUSION

Claimant failed to provide timely notice of his October 1, 2007, accident and, therefore, his Kansas claim is not compensable.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[20] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the March 3, 2015, Award entered by ALJ Howard.

IT IS SO ORDERED.

Dated this ____ day of September, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

[20] K.S.A. 2014 Supp. 44-555c(j).

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Honorable Steven J. Howard, Administrative Law Judge